Commercial Air, Inc. *and* Indiana State Pipe Trades Association and U.A. Local 440, AFL–CIO. Cases 25–CA–092821, 25–CA–099616, 25–CA–099620, 25–CA–099624, and 25–CA–104026

March 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On August 1, 2014, Administrative Law Judge Paul Bogas issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief, and the Charging Party filed a reply brief. The Respondent also filed cross-exceptions and a supporting brief. The General Counsel and the Charging Party each filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Commercial Air, Inc., Lebanon, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly.

"(b) Compensate Christopher Lehr for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarter."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 30, 2015

Mark Gaston Pearce, Chairman

[1] The General Counsel, the Charging Party, and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In upholding the judge's credibility findings, we do not rely on his statement that Charles Howard "testified that prior to when he worked at the Grissom job, T. Gatewood had never complained about his performance." Howard began working at the Grissom job in January 2013. He testified that Tim Gatewood criticized him for working too slowly 6 weeks after Howard started working for the Respondent in 2011.

There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(3), (4), and (1) of the Act by unlawfully suspending Chris Lehr.

In adopting the judge's dismissal of the Lehr and Howard termination allegations, we find that the General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Specifically, we find that the Respondent's unlawful suspension of Lehr and Tim Gatewood's statement in April 2011 that, if Howard "quit Commercial Air and went back to the Union," he would not "be able to be reemployed by Commercial Air," are direct evidence of antiunion animus.

In light of that evidence of animus, we do not rely on the judge's finding that the timing of Lehr's termination in relation to his union activity weakened the General Counsel's case. Moreover, with respect to Howard's termination, we disavow the judge's implication that the General Counsel was required to show that the Respondent's animus was directed at Howard's "*known* union activities." Under *Wright Line*, proving that an employee's protected activity was a motivating factor in the employer's action does not require the General Counsel to make a particularized showing of animus towards the disciplined employee's own protected activity. See, e.g., *Nichols Aluminum, LLC*, 361 NLRB No. 22, slip op. at 3 fn. 7 (2014); *Libertyville Toyota*, 360 NLRB No. 141, slip. op at 4 fn. 10 (2014); *Encino Hospital Medical Center*, 360 NLRB No. 52, slip op. at 2 fn. 6 (2014). We agree with the judge, however, that the Respondent met its *Wright Line* burden to show that it would have terminated Lehr and Howard even absent their protected concerted activity.

Regarding the employment terminations of Lehr and Howard, Member Miscimarra does not reach or pass on whether the General Counsel met his initial burden of proof under *Wright Line*. Even assuming he did, Member Miscimarra agrees with his colleagues that the Respondent showed it would have terminated their employment even in the absence of any protected activities. Member Miscimarra disagrees, however, with his colleagues to the extent they suggest that generalized antiunion animus disconnected from the particular discipline or discharge at issue is sufficient to meet the General Counsel's burden of proof under *Wright Line*. Making a particularized showing that links an employee's protected activity to the adverse employment action taken against that employee is exactly what *Wright Line* requires. In *Wright Line*, the Board stated that the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. In other words, the General Counsel must establish a link or nexus between the employee's protected activity and the particular decision alleged to be unlawful. See *Libertyville Toyota*, supra, slip op. at 9 fn. 5 (2014) (Member Miscimarra, concurring in part and dissenting in part); *Starbucks Coffee Co.*, 360 NLRB No. 134, slip op. at 6 fn. 1 (2014) (Member Miscimarra, concurring).

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall substitute a new notice to conform to the Order as modified.

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend you, change your working conditions, or otherwise discriminate against any of you for supporting the Indiana State Pipe Trades Association and U.A. Local 440, AFL–CIO, or any other union.

WE WILL NOT suspend you, change your working conditions, or otherwise discriminate against any of you for participating in the processes of the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make Christopher Lehr whole for any loss of earnings and other benefits resulting from his suspension and unlawfully imposed change in schedule, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Christopher Lehr for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarter.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension of Christopher Lehr, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

COMMERCIAL AIR, INC.

The Board's decision can be found at http://www.nlrb.gov/case/25-CA-092821 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Michael T. Beck, Esq. and *Ryan Funk, Esq.,* for the General Counsel.

A. Jack Finklea, Esq. (Scopelitis, Garvin, Light, Hanson & Feary, PC), of Indianapolis, Indiana, for the Respondent.

William P. Callinan, Esq. (Johnson & Krol, LLC), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on March 19 and 20, 2014. The Indiana State Pipe Trades Association and U.S. Local 440, AFL–CIO (the Union) filed the charge in Case 25–CA–092821 on November 8, 2012, in Case 25–CA–099616 on March 5, 2013, in Case 25–CA–099620 on March 5, 2013, in Case 25–CA–099624 on March 5, 2013, and in Case 25–CA–104026 on April 30, 2013. The Regional Director for Region 25 of the National Labor Relations Board (the NLRB or the Board) issued the consolidated complaint and notice of hearing on January 31, 2014, and amended the consolidated complaint on February 26, 2014. The consolidated complaint, as amended (the complaint) alleges that Commercial Air, Inc. (the Respondent or the Company) violated Section 8(a)(1) when its president told employees that if they left to work for a union contractor the Respondent would never re-employ them; discriminated in violation of Section 8(a)(4), (3), and (1) when it subjected employee Christopher Lehr to changed working conditions, suspension, and discharge, because he engaged in union and concerted activities, and because he cooperated in a Board investigation; and discriminated in violation of Section 8(a)(3) and (1) when it discharged employee Charles Howard because of his

union activities. The Respondent filed a timely answer in which it denied that it had committed any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent and the Union, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Lebanon, Indiana, provides plumbing, HVAC, and sheet metal services for the construction industry. It annually purchases and receives at its Lebanon, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent is a mechanical contractor that installs plumbing, HVAC systems, piping, and sheet metal work at commercial and industrial sites. The Respondent's owner and president is Tim Gatewood (T. Gatewood) who oversees the entire company but focuses on its field operations. His son, Christopher Gatewood (C. Gatewood), is vice president of the Respondent and focuses on the organization's office and administrative functions. During the time period covered by the complaint—from August 2012 to March 2013—the Respondent's work included a large project at Grissom Air Force Base and a somewhat smaller project at Indianapolis Public School 107 (IPS 107). While the Grissom project was ongoing, the Respondent employed 30 to 40 persons, of whom six were in its plumbing department. Those included the two alleged discriminatees in the case—Charles Howard and Christopher Lehr—as well as Tim Evans, Josh Rayburn, Dana Wildrick, and Sean Young.[3] Three of the plumbers—Howard, Lehr, and Rayburn—were shown to have worked as union-represented plumbers prior to when the Respondent hired them. Lehr was also a current member of the Union. Young oversaw the Respondent's entire plumbing department. On particular jobs, one of the plumbers was designated as the "lead plumber." The lead plumber did not receive a pay differential, but was expected to be the plumber most familiar with the job. T. Gatewood and C. Gatewood both testified that the other plumbers on a job are generally expected to follow the direction of the lead plumber.

At the time the Respondent hired Howard and Lehr, it was aware that Howard had received his training through the Union's apprenticeship program and had been part of the Union, and that Lehr had previously worked as a member of the Union. When T. Gatewood interviewed Howard prior to hiring him in April 2011, T. Gatewood told Howard that if he "quit Commercial Air and went back to the Union," he would not "be able to be reemployed by Commercial Air." Lehr testified that T. Gatewood said something similar to him during the interview that led to his employment in February 2011. Lehr recounted that T. Gatewood said that he had hired "other union people . . . in the past" and "they never stuck around." According to Lehr, T. Gatewood told him that some of the employees who left the Respondent to go to a union job had "come back on their hands and knees begging for their job back, and he just—he couldn't do it." After having his recollection refreshed with his affidavit, Lehr also claimed that T. Gatewood said that he "wasn't going to go union," and that if Lehr ever left to go back to the Union, the Respondent would never rehire him. From the time that Howard began working for the Respondent, he intermittently wore shirts and a jacket with union insignias on them, and also a hard hat with union stickers on it. Howard did not wear these items to support the Union, but simply because they were his work clothes. During the period of Howard's employment, the Respondent's officials never mentioned his union clothes, prior union affiliation, or union activity. T. Gatewood testified, without contradiction, that the Respondent's employees wore clothing with union messages to work "all the time" and that he never discouraged them from displaying these messages.

T. Gatewood did not contradict Howard's account of the 2011 employment interview, referenced above, but did take issue with Lehr's account of Lehr's separate interview. T. Gatewood specifically denied saying that the Respondent would never hire Lehr back if he left and went "back to the Union." According to T. Gatewood's testimony, he discussed Lehr's prior union experience during the employment interview, and told Lehr that in the past he had given union members "jobs for awhile, and they'll get a call back to go and they will pick up their tools and leave immediately." T. Gatewood stated that he told Lehr that such behavior "was unprofessional and unacceptable" and that "several people" had done that and "come back wanting their jobs back" but that he had "no use for them."

B. Union Contacts Respondent's Management and Employees

In May 2012, the Union began to explore the possibility or providing representation to the Respondent's plumbing employees. Two union organizers—John Kurek and Jim Nuttall—met with T. Gatewood and C. Gatewood and discussed how the Union worked and what the organizers said would be the benefits to the Respondent of becoming a union contractor. T. Gatewood expressed a willingness to meet with union officials again, but Kurek contacted him repeatedly over the subsequent 3 months and T. Gatewood declined to schedule a follow-up meeting.

In the meantime, Kurek began to reach out to three employees at the Respondent who had previously worked as union plumbers. Kurek met with Lehr in June 2012 at the union hall.

[1] T. Gatewood stated that Howard was hired to perform pipefitting and welding work, not plumbing work. However, the Respondent's records, including both the employee list that it provided to the Board and the discharge/layoff paperwork that it created for Howard, state that Howard was classified as a plumber. Howard's own testimony was that 25 percent of the work he did for the Respondent was plumbing and that the balance was divided between pipefitting and welding.

At Kurek's request, Lehr began to keep daily logs about "what [wa]s going on" at the Respondent and in particular about anything that was said "positive or negative about the Union." After this meeting, Kurek and Lehr met every 2 weeks throughout the summer of 2012. In July and August, Kurek also met with Howard and Rayburn. Kurek asked Howard and Rayburn whether they would support the Union "if it came to that." Both indicated some reluctance, but eventually told Kurek that they would support the Union. Kurek met with Howard a total of three or four times during the summer of 2012. Howard testified that he sometimes discussed the benefits of union representation with other employees, but his account was not specific about the timing, frequency, or other details of these conversations, and the evidence does not show, or support an inference, that the Respondent was aware of such conversations. By September and October 2012, Kurek was having meetings less frequently, and only with Lehr. Kurek testified that "we weren't sure there was a lot of interest" among the Respondent's employees in "going union."

C. Lehr Meets with T. Gatewood in August 2012

Kurek failed to make any headway persuading the Respondent to meet with the union officials again and eventually, in August 2012, he asked Lehr to approach T. Gatewood. He requested that Lehr tell T. Gatewood "about the benefits of being a union contractor" and that "the Union could have a positive effect on" the Respondent. Kurek also suggested that Lehr tell T. Gatewood that he wanted to continue working for the Respondent, but was also a member of the Union and might have to make a choice. Lehr met with T. Gatewood in August 2012 at the IPS 107 jobsite. According to both T. Gatewood and Lehr, they discussed the Union and the idea that Lehr was going to have to make a choice about whether he stay with the Respondent or leave for work as a union plumber. T. Gatewood testified that Lehr said the Union had a job available for him. Despite Kurek's request, Lehr did not discuss the possible advantages of affiliating with the Union.

Although Lehr and T. Gatewood agree that they discussed the possibility of Lehr leaving the Respondent for work with the Union, their testimonies about some of what was said on that subject differ significantly. According to Lehr, when he mentioned that he would eventually have to choose between working with the Union or with the Respondent, T. Gatewood said you have to "do what is right for your family, but if you ever leave me and go to a union shop, I will never hire you back." T. Gatewood testified, on the other hand, that in response to Lehr's statement about the possibility of leaving for a union contractor, he told Lehr "If you decide to go, I want a notice" and that if Lehr did not give notice he would not be eligible for rehiring. At trial, T. Gatewood stated that having a plumber leave without notice is extremely disruptive because it means that the departing plumber cannot help his replacement with the transition. T. Gatewood expressly denied stating that leaving for a union shop would disqualify Lehr for further employment with the Respondent. Lehr testified that he could not recall whether T. Gatewood told him to provide notice if he decided to leave.

To the extent that Lehr's and T. Gatewood's accounts are inconsistent regarding what was said during the August 2012 meeting at IPS 107, I do not find a basis for crediting one over the other. There were no other witnesses to that meeting and both Lehr and T. Gatewood presented their accounts in a confident manner and that confidence was not meaningfully undermined during cross examination. Some minimal support is lent to Lehr's account by the evidence, not contradicted by the Respondent's witnesses, that when T. Gatewood interviewed Howard in 2011, he used language similar to that which Lehr says T. Gatewood used during the August 2012 meeting. This indicates that such a sentiment is one that T. Gatewood is not unwilling to express, but does not show that he used it again with Lehr in August 2012. At any rate, I believe that, under the circumstances present here, the reliability of Lehr's claim that T. Gatewood made antiunion statements at the August 2012 meeting is undermined by the absence of any contemporaneous documentation of such statements. Lehr testified that he was providing the Union with logs regarding "things that were specifically said, positive or negative about the Union" at the worksite. However, at trial, no log entry was introduced to corroborate T. Gatewood's alleged antiunion statement in August 2012. The first documentation in the record here is the charge that the Union filed approximately 3 months after the August 2012 conversation, and neither that charge, nor any of the other charges in this case, recount the language that Lehr now claims T. Gatewood used.

After the August 2012 conversation, Lehr began to wear union shirts to work and also placed union pamphlets in the break room.

D. Lehr Suspended Shortly After Respondent Learns That He is a Union Organizer

On October 30, 2012, Lehr was transferred, at his request, from the IPS 107 project—where he had been lead plumbe—to the Grissom project. At Grissom, Lehr worked under Wildrick who was already present as lead plumber. The lead plumber spot at IPS 107 was filled by transferring Evans to that job from the Respondent's "Short Ridge" project. Rayburn, a plumber who had been working under Lehr at IPS 107, continued working at IPS 107 under Evans.

One of the claims in this case raises the question of whether the Respondent disciplined Lehr for altering his work schedule without management permission when he began his assignment as a plumber at the Grissom project. Beginning on his first day at Grissom, October 30, 2012, Lehr arrived in time to start work at 6 a.m., with the understanding that he was going to be working 4, 10-hour, days per week. The evidence indicated this was the schedule that lead plumber Wildrick had followed at Grissom for most of the weeks prior to when Lehr joined him there. Timesheet documentation shows that Wildrick reported working a weekly schedule of mostly 4, 10-hour days, starting at 6 a.m., for each of the 6 workweeks from September 10 to October 18, 2012. For a single workweek—from October 22 to 26—Wildrick reported switching to five, 8-hour, days starting at 7 a.m., but as of October 29, Wildrick reported reverting to 4, 10-hour, days starting at 6 a.m.

When Lehr arrived to begin his first day of work at the Grissom jobsite at 6 a.m., the entrance to the work area was locked,

and Lehr did not have a key. Wildrick did not have a key to the work area either, but told Lehr to nevertheless report his hours as 6 a.m. to 4:30 p.m. Wildrick told Lehr that T. Gatewood was aware of the situation. The worksite entrance was opened at approximately 6:20 to 6:30 a.m. each day.

Lehr testified that before he transferred to Grissom, T. Gatewood told him that he would be working 4, 10-hour days per week, starting at 6 a.m. According to Lehr, he considered this preferable to the schedule of five, 8-hour days because Grissom was a 1½ hour drive from his residence and so fewer days commuting was better. T. Gatewood testified that he did not specifically tell Lehr what his schedule would be at the Grissom project. Rather he stated that the project's "construction manager" (an individual who does not work for the Respondent) would set the start time and communicate it to Jamie Price (the Respondent's project manager at Grissom), who would in turn communicate the information to the Respondent's employees there. The Respondent did not call the construction manager or Price as witnesses to testify about what, if anything, management communicated to Lehr regarding his work schedule at Grissom.

Based on Lehr's demeanor, and the above evidence, I credit his testimony that T. Gatewood had authorized him to work a weekly schedule of 4, 10-hour days starting at 6 a.m. at Grissom. His testimony is lent credence by the undisputed evidence that Wildrick, the lead plumber at Grissom, had generally been reporting that schedule for himself, had advised Lehr to report working that schedule, and had assured Lehr that T. Gatewood was aware of the situation. As T. Gatewood and C. Gatewood testified, a plumber would generally be expected to follow the workplace direction of the lead plumber under whom he was working. Although T. Gatewood testified that Lehr had changed his schedule without authorization at Grissom, T. Gatewood did not explain how he reached this conclusion given his admission that he did not know what any manager or supervisor told Lehr about his schedule there. T. Gatewood testified that the default schedule with the Respondent was a week of 8-hour days starting at 7 a.m., but he also allowed that the construction manager at Grissom would set the specific schedule there, and would communicate that schedule to the Respondent's employees by way of Price.

On November 4, Lehr reported to the Respondent's office by email that the hours for his first week at Grissom were 10 hours per day starting at 6 a.m. for 3 days, and 9.5 hours, starting at 7 a.m., for a 4th day. This report did not initially elicit any objection from the Respondent. On November 8—a little over a week after Lehr transferred to the Grissom project—Kurek sent a letter to T. Gatewood by facsimile (FAX) and regular mail announcing that Lehr "wishes to be known as [a] 'Volunteer Union Organizer'." The Union's facsimile (FAX) log shows that this letter was successfully transmitted to the Respondent's office on November 8 at 7:39 a.m.[2] That same day, the Union filed an unfair labor practices charge alleging that, on about August 17, 2012, the Respondent verbally threatened and intimidated an employee based on union affiliation. Although Lehr was not specifically referenced in the charge, T. Gatewood testified that, in light of the letter identifying Lehr as a union organizer, the Respondent's "assumption" was that the ULP charge concerned statements management made to Lehr. The Respondent received the charge in its offices on November 9, 2012. T. Gatewood did not know that Lehr was involved with a union organizing campaign prior to November 8.

Within a few hours after the Respondent received the letter designating Lehr as a volunteer union organizer, C. Gatewood spoke with Wildrick and Lehr by phone and challenged them about the work hours they had reported.[3] C. Gatewood subsequently spoke to T. Gatewood about the matter. T. Gatewood testified that he was "pretty mad" about Wildrick and Lehr "changing their work hours" and just "s[itting] at the gate until the job superintendent got there to unlock the door." T. Gatewood contacted Lehr by phone, sometime between November 8 and 11, and told him not to come to Grissom the next scheduled workday—Monday, November 12, 2012—but rather to wait for further instructions about a meeting. T. Gatewood did not tell Lehr what the meeting would be about. T. Gatewood testified that at the time he made this call he had not decided what action he was going to take about the time report issue, but did know they "needed to talk about it again." He stated that "Chris [Lehr] was less responsible for that action than Dana [Wildrick]," but that since Lehr had followed Wildrick "it's still a wrong situation."

T. Gatewood and Lehr met on November 12 at a restaurant.[4] Young, the head of the plumbing department, also attended. At the meeting, T. Gatewood did not discuss the fact that Lehr had, just a few days earlier, been designated as a union organizer, but T. Gatewood admitted at trial that he had been aware of that designation at the time of the November 12 meeting. By the time of the meeting, T. Gatewood was also aware of the Union's charge regarding Lehr.

T. Gatewood testified that he admonished Lehr for changing

[2] The Respondent submitted a copy of Kurek's letter that had a date stamp, added by the Respondent, which reads "November 9, 2012." The date-stamped version does not include a FAX banner and there is no indication that the date stamp indicates when the letter was received in the Respondent's office by FAX, as opposed to when it was received by mail. I find that the letter was received in the Respondent's offices by FAX at approximately 7:39 a.m. on Thursday, November 8.

[3] Lehr testified that T. Gatewood did not contact him about the time sheet issue until November 11, however, Lehr did not testify about, or deny, that he had a conversation with C. Gatewood on November 8. Since neither Lehr, nor any other witness, denied C. Gatewood's testimony regarding such a conversation, I credit C. Gatewood's facially plausible account of the timing and content of that conversation.

[4] T. Gatewood admits that by the time the meeting took place on November 12 he was aware of the letter designating Lehr as a volunteer union organizer, however, he denies that he was aware of that designation when he set up the meeting. Based on my review of the record as a whole, I find that the Respondent received and was aware of the Union's letter about Lehr prior to when T. Gatewood set up the meeting with Lehr. That letter had been received in the Respondent's office, overseen by C. Gatewood, 1 to 3 hours before C. Gatewood spoke with Wildrick and Lehr about the scheduling issue. C. Gatewood did not testify that he was unaware of the letter that had been received in the Respondent's office at the time he decided to investigate the schedules of employees at Grissom and contacted T. Gatewood about those schedules.

his schedule without authorization and not for reporting that he started work at a time when the jobsite was not accessible. Lehr, on the other hand, remembered the focus being on the start-time issue. Lehr testified that he told T. Gatewood he was working the schedule that T. Gatewood himself had agreed to, and that he was reporting his time the way Wildrick told him to. Lehr also told T. Gatewood that he agreed it was not proper for the plumbers at Grissom to report working at a time when they could not access the worksite, but that at the same time it was not his responsibility to arrange to have access to the facility at the agreed-upon time. T. Gatewood told Lehr that he had not agreed to that schedule and did not approve of it. He said that in the future Lehr would be working a weekly schedule of five, 8-hour days.

During the meeting, the Respondent also raised other criticisms that T. Gatewood does not claim he had planned to discuss with Lehr prior to receiving the letter regarding Lehr's status as a union organizer. T. Gatewood testified that he "confronted," Lehr about using his cell phone while on the job. T. Gatewood says that he did this because it "seemed like [Lehr's cell phone use] had picked up a little bit there." Lehr told T. Gatewood that he was not using the phone for personal business. T. Gatewood also confronted Lehr about rumors that Lehr had said he "want[ed] to be laid off and draw unemployment." Lehr told T. Gatewood that he had not made such statements. At some point, Young joined in criticizing Lehr, stating that the customer at IPS 107 wanted some modifications to work that had been completed when Lehr was the lead plumber there. The Respondent knew about these requested changes 2 months earlier, but had not made an issue of them to Lehr prior to the November 12 meeting. At any rate, T. Gatewood testified that he had no problem with the quality of Lehr's work. (Tr. 40–41.)

T. Gatewood suspended Lehr on November 12, but did not give Lehr any formal notification or paperwork regarding the action. Lehr found out about the suspension when he received a paycheck showing that he had not been paid for November 12. At trial, T. Gatewood specifically stated that the suspension was based on an unauthorized schedule change, not the other criticisms leveled at Lehr during the November 12 meeting (i.e., cell phone use, rumor that Lehr had said he wanted to be laid off, quality of the plumbing work at IPS 107). T. Gatewood testified that the other problems "weren't anything that would have caused him any problem whatsoever." The record indicates that, in addition to suspending Lehr, the Respondent made some deductions from both Lehr's and Wildrick's pay to reflect the periods when they were unable to access the worksite.

The Respondent did not suspend or otherwise discipline Wildrick as it did Lehr. The Respondent's records do not contain documentation showing that T. Gatewood even spoke to Wildrick about the issue. This was the case even though T. Gatewood testified that Wildrick, as lead plumber, was more responsible than Lehr for the way the two plumbers were reporting their schedules at Grissom. According to T. Gatewood, he dealt more harshly with Lehr than Wildrick because Lehr had changed his schedule without authorization on two prior occasions during his employment with the Respondent. T. Gatewood did not specify when Lehr had made those prior unauthorized changes and no contemporaneous records were introduced showing that Lehr had been disciplined, or warned, for such actions. Lehr stated that in the past he had modified his schedule with the approval of the general contractor's foreman—who did not work for the Respondent—and that T. Gatewood then told him that such approval was not adequate and that he had "to tell somebody" about such changes.

On November 21, 2012—approximately 2 weeks after being notified that Lehr was a volunteer organizer for the Union—T. Gatewood issued a memorandum notifying employees that "the Company opposes unionization." The memorandum warned employees that unionization "would not be good for you" based on a number of reasons including "job security," that unions "cost money," and that "[y]ou can't rely on any promises made by a union." In the memorandum, T. Gatewood advises employees that if they are contacted by a union representative they have a right to: state that you do not want to talk to them; tell them not to bother you; and state your feelings about the Union.

In December 2012 and January 2013, Kurek visited Grissom on two occasions. He "walked the job" and left business cards and handbills for employees in their tool boxes and break areas. The Respondent was not shown to have been aware of this activity by Kurek.

E. Termination of Howard

Howard started working for the Respondent in April 2011. He is a licensed plumber, and was classified by the Respondent as a plumber, although only about 25 percent of the work he did for the Respondent was plumbing. T. Gatewood testified that Howard had excellent skills and knowledge, but intermittently failed to perform at a level consistent with his abilities. Howard, on the hand, testified that he always "tried to perform things the fastest, safest, most professional way I could."

After Howard had been working for the Respondent for approximately 6 weeks, T. Gatewood criticized his work pace. In one instance, Howard was working on air handlers at the Tech High School worksite, and T. Gatewood told him that a recently terminated employee, Jack Price, had been performing the work faster. T. Gatewood testified that this was a "disciplinary conversation," but no contemporaneous documentation of discipline was submitted at trial. Shortly thereafter, T. Gatewood told Howard he was working too slowly on another task—demolishing old boilers to make way for the installation of new equipment. At that time, T. Gatewood talked to Howard about the possibility that his productivity issues would result in discharge. Howard told T. Gatewood that the "torch" he had been given to perform this work was not big enough and that more personnel were needed. For the next couple of days, T. Gatewood worked alongside Howard demolishing the boilers. Then T. Gatewood assigned another employee, Albaugh, to work with Howard on the task. Approximately 11 months later, on April 25, 2012, Howard arrived late for work and the Respondent sent him home and issued a written "second warning" to him.

Not all the feedback that Howard received from the Respondent was negative. In October 2012, T. Gatewood took Howard and approximately 14 other employees on a company-

sponsored trip to Talladega, Alabama, where they attended an automobile race. T. Gatewood told Howard and the other employees on the trip that this was to "thank them" for their good work. In December 2012, T. Gatewood distributed bonuses to employees. T. Gatewood shook Howard's hand and said: "Thank you for the work you have done. I am glad I hired you. I'm glad you work for us." He gave Howard a bonus of $500, which was considerably more than some others, including Lehr, received.

In January 2013, the Respondent transferred Howard to the Grissom jobsite. At that location, Howard generally received his work-related instructions from Ken Working. After the transfer, Howard began to carpool to the jobsite with Lehr, who was commuting in a company truck. The Respondent was aware that Howard and Lehr were driving together.

Howard testified that during this latter period of his employment he felt that "Everybody was tense and . . . felt kind of a grip tightening on them because I don't believe that job was going as well as it should have, and [T. Gatewood] was looking for [a] way to . . . lessen that." In February 2013, T. Gatewood came to the Grissom jobsite and yelled at Howard, stating that he "wasn't getting anything done" on the air compressor work.[5] Then, T. Gatewood told Howard that he was discharged, but would be permitted to finish out the day so that he could carpool home with Lehr as he usually did. Howard told T. Gatewood that he had work to show, but that he had been unable to finish it because he was waiting for necessary parts. T. Gatewood told him that if he was waiting for parts he should have asked to do other chores in the meantime. The record shows that T. Gatewood had started documenting the state of Howard's project in order to assess Howard's progress and that it was based on that documentation that T. Gatewood decided to lodge his criticism. Neither Working nor Price (project manager) had previously told Howard that he was not working fast enough at Grissom. However, Howard subsequently asked for Price's feedback, and Price replied that Howard could have done the work "somewhat faster."

Later on the same day, T. Gatewood told Howard that he could have another chance, but that he would be on "probation," and would be fired immediately, and without discussion, if his performance fell short again. According to T. Gatewood, he allowed Howard this second chance because Howard apologized and said he could not afford to lose his job. Howard, however, testified that the reason he was retained was that he was provided with necessary parts and, as a result, was able to finish projects and show T. Gatewood how much work he had accomplished.

During the subsequent probationary period in February, Howard was assigned to build large "stands." Howard testified that he attempted to get feedback from Working on how he was doing, and that "nobody came out and said the [stands] were going too slow." Over the next 4 days, Howard completed six stands. T. Gatewood testified that he found this level of productivity unacceptable and that another employee had completed the same six stands in less than half the time it took Howard. He also stated that Howard's stands were not properly "lined up." T. Gatewood testified that because of these perceived deficiencies he told the foreman, Jamie Price, to fire Howard. T. Gatewood further testified that other factors, including Howard's prior instances of tardiness, played no part in the decision. On February 26, Price informed Howard that the Respondent was terminating him. Howard contacted T. Gatewood to find out whether he was "laid off" as opposed to "let go." T. Gatewood told Howard that it was a layoff, but also said that Howard's performance was not acceptable.

Although T. Gatewood testified that Howard's performance was the reason for the separation decision, the "Employee Discharge/Layoff Checklist" form, which was signed by Young (the plumbing department manager), states that Howard's employment ended because of a "Work slow down/plumbing department labor reduction" on February 26, 2013. The paperwork form has a number of preprinted headings, including one for "warnings." Young entered the following information in that section:

> Date: 2012 Violation: Numerous verbal reprimands due to tardiness
> Date: 4/25/2012 Violation: Suspended (1) day unpaid for work production and time card falsifying
> Date: 2013 Violation: Verbal reprimand due to work ethics and production

Contemporaneous documentation exists for a violation on April 25, 2012. However, that documentation, which is discussed above, references tardiness, and makes no mention of the "work production" or "time card falsifying" problems that the Respondent alleged on the discharge/layoff paperwork completed 10 months after-the-fact.

T. Gatewood testified that he had terminated "a lot" of employees other than Howard for unacceptable performance. The only one he specifically identified, however, was Jack Price. No documentation was introduced regarding Jack Price's separation from the Company, but the record indicates that it took place in early to mid-2011.

F. Termination of Lehr

Lehr was hired by the Respondent as a plumber in February 2011. At the end of October 2012, Lehr voluntarily transferred from the IPS 107 job, where he had been lead plumber, to the Grissom jobsite, where he worked under lead plumber Wildrick. On March 1, 2013, Young informed Lehr that he was laid off.[6] Young told Lehr that the business was "running

[5] Howard testified that prior to when he worked at the Grissom job, T. Gatewood had never complained about his performance. This is not credible given Howard's own testimony that T. Gatewood had criticized his performance at the Tech High School job in 2011.

[6] Kurek testified that on Thursday, February 28, 2013, he filed a safety complaint against the Respondent with the Occupational Safety and Health Administration (OSHA). Kurek stated that this complaint was based on concerns communicated to him by Lehr, and that he told Lehr that the Union could file the complaint and that it "wouldn't involve [Lehr] at all." The evidence does not show that the Respondent was aware of the Union's February 28 OSHA complaint at the time it dismissed Lehr just one day later on March 1. Lehr gave hearsay testimony that an OSHA investigator visited the jobsite to investigate this charge during the week he was laid off. He did not witness this visit

slow and hopefully things would pick up." T. Gatewood testified that Lehr was separated as part of a labor force reduction in the plumbing department due to a decrease in workload. This is what is reflected in the Respondent's paperwork regarding the separation. Lehr's layoff occurred 4 days after Howard was terminated and within a month after the Respondent laid off another former union plumber, Rayburn.[7] These were the only three plumbers, among the six employed by the Respondent, who were shown to have a history of union affiliation. The Respondent also laid off Evans, a plumber who was not shown to have such a history, on February 28. The Respondent recalled Evans less than 2 weeks later on March 11, but has not recalled Howard, Lehr, or Rayburn to work. Young and Wildrick were not laid off at all, and at the time of the trial in March 2014, they were the only individuals who the Respondent still employed in the plumber classification.

In an effort to show that Lehr's layoff was part of a lawful labor reduction, the Respondent relies largely on the testimony of T. Gatewood. He stated that the job Lehr was working on "was coming to an end where we only needed one plumber"—Wildrick—"to finish up the project," and that the Respondent's business had taken a downturn and it did not have another job "to send [Lehr] to." According to T. Gatewood, he based the conclusion that Wildrick could finish the Grissom plumbing work alone on opinions expressed to him by Wildrick and Young, but the Respondent did not call Wildrick or Young to testify even though both were still employed by the Respondent at the time of trial. T. Gatewood testified that a lack of work was the only reason that Lehr was terminated and that, during the period of Lehr's employment, the Respondent had no problem with the quality of his work. The Respondent did not support T. Gatewood's representations about a downturn in business with documentary evidence regarding the Company's revenues, contracts, or total payroll hours. Nor did the Respondent call other witnesses to corroborate T. Gatewood's assertions regarding the state of the work at Grissom, or the Respondent's business generally, in 2013. Payroll records submitted by the General Counsel for work at Grissom during the period leading up to, and immediately following, Lehr's termination show some variability in total hours worked, but not a dramatic decline.[8]

Lehr testified that at the time the Respondent terminated him, approximately 20 to 30 percent of the plumbing work was still left to do at Grissom, but that most of the remaining plumbing work was of a different type than he had been doing there. T. Gatewood did not specifically contradict Lehr's assessment of how much plumbing work remained to be done at Grissom. However, T. Gatewood did credibly testify that after Lehr was laid off, the Respondent did not contract out any plumbing work, and that Wildrick finished the plumbing work at Grissom alone, without another plumber being brought in to replace Lehr. The evidence does not show that the Respondent hired any additional plumbers after Lehr was discharged, unless one counts the recall of Evans.

At trial, T. Gatewood testified about his decision to retain Wildrick, instead of Lehr, to finish up the work at Grissom, and his decision to recall Evans, instead of either Lehr or Rayburn, on March 11. He stated that Wildrick was selected for retention because he was the plumber most familiar with the Grissom job in that he was lead plumber there and had been on the project since the beginning. Neither Lehr's testimony, nor any other evidence, contradicted T. Gatewood's credible testimony on this subject. Regarding Evan's selection for recall, T. Gatewood stated that Evans was initially recalled for the purpose of remedying deficiencies at the Short Ridge project that the client there had identified on a list provided to the Respondent. After finishing the items on Short Ridge list, Evans was assigned to remedy problems that the IPS 107 client had identified on a list for that location. T. Gatewood testified that it is standard practice for the client to create this type of "punch list" of perceived deficiencies when the Respondent is completing a project. According to T. Gatewood, he selected Evans to perform the work at Short Ridge because he had been the lead plumber there. T. Gatewood indicated that he subsequently used Evans to complete the punch list at IPS 107 because Evans was already working for the Respondent and had been lead plumber at IPS 107 during the period after Lehr transferred from that jobsite to Grissom. T. Gatewood also explained his decision by stating that an inordinate number of the deficiencies at IPS 107 were Lehr's fault, and that he did not want to pay Lehr twice for the same work. T. Gatewood conceded that Wildrick and Evans were also correcting work that had been their responsibility in the first instance. T. Gatewood did not provide meaningful specifics to support his assertion that Lehr was responsible for an inordinate number of deficiencies. On the other hand, there was no evidence directly contradicting T. Gatewood's contention, with the exception of T. Gatewood's own testimony that he did not have any problems with the quality of Lehr's work.

The General Counsel points out that at the time Respondent

himself and did not reveal the basis for his testimony about it. At any rate, it is unlikely that an OSHA investigator would have appeared at the Grissom worksite to investigate a complaint within one day of the complaint being filed. Indeed, Kurek testified that even after he filed the safety complaint, OSHA was unable to identify the location of the alleged violations and had to contact him by phone for that information. Moreover, Kurek testified that his understanding was that OSHA never followed up on his complaint. Neither the Region's complaint nor the General Counsel's post-trial brief allege that the Respondent discriminated based on the OSHA complaint.

[7] The termination paperwork for Rayburn states that the action was taken on February 28, 2012. However, during T. Gatewood's testimony, he gave the date as February 8.

[8] Payroll hours at Grissom were as follows:

Week Ending	Total Payroll Hours	
01/06/2013	335	
01/13/2013	376	
01/20/2013	373	
01/27/2013	412	
02/03/2013	436	
02/10/2013	390	
02/17/2013	440	
02/24/2013	430.75	
03/03/2013	448	(Lehr laid off on 3/1)
03/10/2013	404	
03/17/2013	348.5	
03/24/2013	384	

laid off plumbers in February and March 2013, it continued to employ two individuals who were participating in a plumbing apprenticeship program. The General Counsel suggests that the continuation of those apprenticeships shows that the Respondent did not have a lack of plumbing work that explains the decision to lay off Lehr. The two apprentices—Brian Moore and Dave Richardson—were working in the Respondent's HVAC department, but the Respondent paid for them to participate in a nonunion apprenticeship program through which they attended classes and were required to perform plumbing work for the Respondent under the supervision of licensed plumbers. T. Gatewood testified that Moore and Richardson actually did very little on-the-job plumbing work and that he signed documents certifying that they were doing plumbing work at times when he did not actually believe they were doing so. There was no contrary testimony indicating that Moore and Richardson were performing significant amounts of plumbing work during the relevant time period. It appears that Lehr could have testified about the nature and quantity Richardson's apprentice plumbing work since Lehr was the licensed plumber who signed a number of the documents reporting on Richardson's monthly apprenticeship work.

III. ANALYSIS AND DISCUSSION

A. Alleged 8(a)(1) Threat

The General Counsel argues that the Respondent threatened employees in violation of Section 8(a)(1) of the Act when, in August 2012, T. Gatewood told Lehr that if he ever left the Respondent and went to work for a unionized employer, the Respondent would never rehire him. Genrl Counsel's Brief at page 14, citing *Anaheim Plastics*, 299 NLRB 79 (1990) (employer violated Section 8(a)(1) when it told employee that if she went on strike the employer would never give her work again). For the reasons discussed above, I find that the record does not establish that T. Gatewood made such a statement to Lehr in August 2012.[9] Moreover, neither the General Counsel nor the Charging Party contend that the statement T. Gatewood admits to making at that time—i.e., that he expected Lehr to give him reasonable notice before leaving and that the Respondent would not rehire him if he failed to do so—interfered with protected union activity in violation of the Act.

For these reasons, the allegation that the Respondent coerced employees in violation of Section 8(a)(1) on or about August 17, 2012, should be dismissed.

B. Alleged Discrimination Against Lehr on November 12, 2012

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) and Section 8(a)(4) and (1) on about November 12, 2012, by discriminatorily suspending Lehr and changing his weekly schedule from 4, 10-hour days to five, 8-hour, days.[10] Under the Board's *Wright Line* decision, in cases alleging discrimination in violation of Section 8(a)(3) and (1), where motivation is at issue, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 3–4 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. *Brink's, Inc.*, 360 NLRB No. 136, slip op. at 1 fn. 3 (2014); *Camaco Lorain Mfg. Plant*, supra. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Board also applies this *Wright Line* analysis to allegations that an employer violated Section 8(a)(4) and (1) by discriminating against "an employee because he has filed charges or given testimony" in a Board proceeding, *Verizon*, 350 NLRB 542, 546–547 (2007); *American Gardens Mgmt. Co.*, 338 NLRB 644, 644–645 (2001); *Gary Enterprises*, 300 NLRB 1111, 1113 (1990), enfd. mem.958 F.2d 368 (4th Cir. 1992).

The General Counsel has met its initial burden of showing that that Lehr's suspension and schedule change on November 12 were discriminatory in violation of Section 8(a)(3) and 8(a)(4). The first two elements are established since Lehr engaged in activities protected by the Section 8(a)(3) and (4), and the Respondent was aware of those activities at the time it suspended him and changed his work schedule. T. Gatewood testified that when he took the challenged actions on November 12, he was aware that Lehr had been identified as a union organizer in the Union's November 8 letter, and that Lehr was the subject of the unfair labor practices charged filed by the Union on November 8. See *Fairprene Industrial Products*, 292 NLRB 797, 804 (1989) (employer discriminates in violation of Section 8(a)(4) when it takes action against an employee because he or she was the subject of an unfair labor practices charge filed by the union), enfd. mem. 880 F.2d 1318 (2d Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

The third element of the prima facie case is met because the

[9] The evidence did show that T. Gatewood said something similar to what is alleged, but to Howard (not Lehr) and in about April 2011 (not Aug. 2012). The April 2011 statement to Howard is not alleged to be a violation and, in any event, such an allegation would appear to be time-barred by Sec. 10(b) of the Act.

[10] The Respondent contends that Lehr's schedule was already 5, 8-hour days and that he had been working the 4, 10-hour, day schedule without authorization. For the reasons discussed above, I reject this contention and find that the Respondent did, in fact, change Lehr's schedule on November 12 as alleged.

evidence shows that the Respondent bore animus towards the Union and the protected activity discussed above. Shortly after T. Gatewood discovered that one of his employees, Lehr, had become an organizer for the Union, he issued a statement to employees informing them that the Respondent "oppose[d] unionization," that it "would not be good for you" for reasons that included "job security," and that "[y]ou can't rely on any promises made by a union." Although these statements are not alleged, or found, to violate the Act, they shed light on the Respondent's motivation regarding the actions that are alleged to be violations. See *Brink's, Inc.*, supra, ("[I]t is well established that conduct that exhibits animus but that is not independently alleged or found to violate the Act may nevertheless be used to shed light on the motive for other conduct that is alleged to be unlawful."). In another instance, T. Gatewood warned Howard that if he ever left the Respondent "and went back to the Union" the Respondent would never reemploy him.[11] These statements by the Respondent's owner and president demonstrate hostility towards, and mistrust of, the Union and union activity.

The conclusion that the Respondent bore animus towards Lehr's protected activity is also supported by the timing of its November 12 actions against him. The Respondent did not show that, during the approximately 20 months Lehr worked for the Company prior to being identified as a union organizer, it had issued any discipline against him at all. However, within hours of Lehr being identified to the Respondent as a union organizer, the Respondent challenged Lehr about his work schedule and, shortly thereafter, suspended him. The timing of the suspension is made even more suspect because Lehr informed the Respondent of the schedule he was following at Grissom in a November 4 email, but T. Gatewood did not question or discipline Lehr about that schedule until 8 days later—after the Respondent found out that Lehr was a union organizer and the subject of a charge filed by the Union. Similarly, during the November 12 meeting, the Respondent criticized Lehr about work that he had completed 2 months earlier, but which the Respondent had not seen fit to complain to him about until after it became aware of his protected activities.[12] During the meeting, the Respondent also challenged Lehr about using his cell phone and about rumors that Lehr had said he wanted to be laid off—neither of which were problems the Respondent claims it planned to discuss with Lehr prior to receiving notice of his status as a union organizer and of the unfair labor practices charge. *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2005) (fact that employer's adverse action against employee immediately followed employer's first knowledge of that employee's union sympathies, supports an inference of animus), enfd. 232 Fed. Appx. 270 (4th Cir. 2007); see also *Camaco Lorain*, supra, *Desert Toyota*, 346 NLRB 118, 120 (2005), pet. for review denied 265 Fed. Appx. 547 (9th Cir. 2008); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), enfd. sub nom. *Carolina Holdings, Inc. v. NLRB,* 5 Fed. Appx. 236 (4th Cir. 2001); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994).

Since the General Counsel has made the required initial showings under *Wright Line*, the burden shifts to the Respondent to show that it would have suspended Lehr, and changed his schedule, even absent Lehr's protected activity. The Respondent cannot meet this burden merely by showing that misconduct also factored into its decision. Rather, the Respondent's burden is to show that the misconduct would have resulted in the same action even in the absence of the employee's union and protected activities. *Monroe Mfg.*, 323 NLRB 24, 27 (1997). In this instance, the Respondent has failed to meet its burden with respect to either of the actions taken on November 12. Regarding the suspension, the Respondent claims that it took this disciplinary action because Lehr changed his work schedule without authorization. The evidence showed, however, that T. Gatewood himself authorized the schedule that Lehr was working and that Wildrick, the lead plumber who oversaw Lehr's work at Grissom, told Lehr to continue reporting that schedule despite problems with access to the jobsite. Since T. Gatewood himself authorized the schedule Lehr was following, the Respondent has not shown that it suspended Lehr for making unauthorized changes to his work schedule.

Even if one assumes, contrary to the weight of the evidence here, that T. Gatewood had not authorized Lehr's schedule at Grissom, the Respondent's defense would still fail because the Respondent has not shown that it would have suspended Lehr for making changes to his work schedule if he had not engaged in protected activities. Indeed, the record demonstrates that Wildrick, the other plumber at Grissom, was following the same schedule as Lehr, and, according to T. Gatewood, was also doing so without authorization. However, the Respondent did not discipline, much less suspend, Wildrick. This was the case even though T. Gatewood conceded that Wildrick, as lead plumber, bore more responsibility than Lehr for the purported misconduct. Indeed the record shows that Lehr—having previously been told by T. Gatewood that he could not change his schedule without "tell[ing] somebody"—discussed the jobsite access problems with Wildrick and Wildrick told him to continue with the schedule that the Respondent now claims warranted discipline.

The Respondent has also failed to meet its burden of showing that it would have changed Lehr's weekly schedule at Grissom to five, 8-hour, days if not for Lehr's protected activity. In reaching this conclusion, I considered T. Gatewood's testimony that the Respondent could not pay Lehr and Wildrick to sit and wait for the Grissom jobsite to be unlocked. That is a reasonable enough point, but it does not explain why the Respondent eliminated Lehr's preferred schedule of 4,10-hour days, rather than simply telling him to report when the gates opened at 6:30 a.m., rather than at 6 a.m.

For the reasons discussed above, I conclude that the Re-

[11] This statement to Howard was made outside the Section 10(b) charge filing period, but is still properly considered in determining whether antiunion animus has been shown with respect to the timely allegations. *Jack in the Box Distribution Center Systems,* 339 NLRB 40, 52 (2003); *Wilmington Fabricators, Inc.*, 332 NLRB 57, 58 fn. 6 (2000); *Kaumagraph Corp.*, 316 NLRB 793, 794 (1995).

[12] The sudden concern over Lehr's supposed poor workmanship on that job is particularly suspect given T. Gatewood's own testimony that the quality of Lehr's work was never a problem during his employment with the Respondent.

spondent discriminated in violation of Section 8(a)(3) and (1), and Section 8(a)(4) and (1), of the Act on November 12, 2012, by suspending Lehr, and changing Lehr's work schedule, because Lehr engaged in union activity and was the subject of an unfair labor practices charge filed by the Union.

C. Alleged Discriminatory Termination of Lehr

The General Counsel also alleges that the Respondent violated Section 8(a)(3) and (1), and Section 8(a)(4) and (1) of the Act on March 1, 2013, because it discriminatorily terminated Lehr's employment based on his protected activities. The same *Wright Line* analysis described above applies to these allegations. In this instance the General Counsel has met its initial burden by showing, inter alia, that the Respondent was aware that Lehr was a volunteer organizer and that he was the subject of the unfair labor practices charge filed by the Union. Unlawful animus is demonstrated because, as found above, the Respondent had previously, on November 12, 2012, discriminated against Lehr by suspending him and changing his work schedule because of his protected activities. Nevertheless, the prima facie case is less compelling with respect to the termination than it was with respect to the Respondent's November 12 actions because the timing is not as suspect. The record does not show that the Respondent knew that Lehr had engaged in any protected activities in the period immediately prior to his termination or, for that matter, at any time after November 2012. Nor does the record show that the Union had petitioned for a representation election, filed additional unfair labor practices charges, or otherwise given the Respondent reason to believe that, as of the time of Lehr's termination, a union campaign was gaining momentum, or was even still active, among employees. The record does not show that the Respondent engaged in any antiunion activity during the 3-month period preceding Lehr's dismissal.

Since the General Counsel has made the required initial showing, although rather weakly, the burden shifts to the Respondent to show that it would have dismissed Lehr even absent his protected activities. Whether it has is a close call on the thin record regarding this issue. T. Gatewood testified that Lehr was laid off because of a lack of work for him. That was the reason given contemporaneously in the separation paperwork signed by Young, the Respondent's plumbing foreman. According to T. Gatewood, business had taken a downturn, and with the Grissom and IPS 107 coming to an end, there was not work to warrant Lehr's continued employment. There is some support for this claim in the surrounding circumstances. At around the time of Lehr's termination, the Respondent reduced its total number of plumbers from six to three and a year later, at the time of trial, the Respondent was down to only two plumbers. After Lehr's dismissal, the Respondent did not hire new plumbers or contract out any plumbing work. T. Gatewood testified in a confident manner regarding these subjects and there was nothing in his demeanor that suggested a lack of credibility regarding them.

On the other hand, the Respondent did not introduce documentation of a downturn in its revenue or a reduction in the number and/or size of its current or upcoming projects. There was no documentation showing that the total number of plumbing hours its employees were working had been consistently reduced. Nor did the Respondent produce any evidence of predismissal meetings or conversations during which the Respondent's managers discussed a downturn in business or the possibility of using layoffs to deal with a downturn. Neither Young, nor any other manager, was called to corroborate T. Gatewood's testimony regarding the reason that Lehr was terminated.[13]

I find that the Respondent's evidence, standing on its own, is marginally sufficient to show that, more likely than not, the Company would have dismissed Lehr due to lack of work even absent his protected activities. Moreover, after considering the record, I find an absence of persuasive countervailing evidence. The General Counsel and the Charging Party did not rebut the evidence that the Respondent was experiencing a downturn in its plumbing workload. Nor was there evidence undercutting T. Gatewood's testimony that Lehr's termination was the result of a shortage of work. Lehr did testify that there was plumbing work left to be done at Grissom, but he conceded that the type of plumbing work he had been doing there was essentially complete.

In reaching the conclusion that the Respondent succeeded in showing it would have released Lehr absent his protected activity, I considered the evidence that the Respondent retained Wildrick (rather than Lehr) to finish the work at Grissom, recalled Evans (rather than Lehr) to perform the punch list for the Short Ridge project and retained Evans (rather than recall Lehr) to perform the punch list for the IPS 107 project. Regarding Wildrick, the evidence showed that he was the lead plumber at Grissom, had been on that project since its inception, and was the plumber most familiar with the job. Under those circumstances, I find nothing suspect in the Respondent's decision to retain Wildrick, rather than Lehr, as the Grissom project wound down. Similarly, Evans had been the lead plumber at Short Ridge and was recalled to finish up that project. With respect to IPS 107, Evans had been made the lead plumber there after Lehr left that position in November 2012. There is nothing facially suspect about the Respondent's decision to use Evans—who it was already employing and who was the most recent lead plumber at IPS 107—rather than recall Lehr to finish that work. Given all the circumstances discussed above, I conclude that the Respondent has succeeded in carrying its burden of showing that it would have terminated Lehr as it did even absent his protected activities.

For the reasons discussed above, I find that the General Counsel has failed to establish that the Respondent violated Section 8(a)(3) and (1) or Section 8(a)(4) and (1) when it terminated Lehr's employment on March 1, 2013. Those allegations should be dismissed.

D. Alleged Discriminatory Termination of Howard

The General Counsel alleges that the Respondent terminated Howard on February 26, 2013, because of his protected union affiliation and activity and that the termination was therefore discriminatory in violation of Section 8(a)(3) and (1) of the Act.

[13] C. Gatewood testified, but was not asked about the reasons for Lehr's termination.

Regarding the General Counsel's initial burden under *Wright Line*, supra, the evidence showed that the Respondent knew that Howard had been part of the Union in the past and also knew that from the time Howard started with the Respondent in April 2012 he often wore union clothing and a hard hat with union stickers. The record shows that, in addition, Howard engaged in activities in support of the Union campaign, but does not show that the Respondent was aware of those activities. Specifically, Howard spoke with Kurek three or four times in the summer of 2012 and told Kurek that he would support the Union if "it came to that." Howard also sometimes discussed the benefits of union representation with other employees, but the record does not show when, or how often, he did this. The Respondent was not shown to have had knowledge of Howard's union-related conversations with Kurek and other employees. The General Counsel invites me to assume that, because the Respondent knew that Howard and Lehr carpooled in a company truck, the Respondent must have known that Howard, like Lehr, was a union supporter. Under all the circumstances present here, I do not find that any such assumption is warranted. The simple fact that the two shared the use of a company truck does not suggest that they shared the same view about the Union or any other workplace issue. Moreover, the Respondent knew that when Lehr became involved with the organizing campaign the Union notified the Respondent of that fact, but the Union never notified the Respondent that Howard was a union organizer or supporter.

Based on the Respondent's discrimination against Lehr in November 2012, I find that the General Counsel has demonstrated that the Respondent was hostile towards the Union and union activity. That being said, I find the evidence that the Respondent was hostile towards Howard's *known* union activities to be tenuous. Howard wore work clothes that carried union references, but he had done so since he was hired and the Respondent never discouraged these displays. Moreover, T. Gatewood testified, without contradiction, that the Respondent's employees wore union clothes to work "all the time" and that he had never discouraged employees from wearing clothes because they carried such messages. Regarding the fact that Howard had previously been part of the Union, the Respondent was aware of that before it hired him and never mentioned the prior affiliation, or the Union, to him after he was hired. On the other hand, as discussed above, T. Gatewood demonstrated animosity towards the Union before hiring Howard when, during a job interview, he told Howard that if he ever left the Respondent and went back to the Union he would be ineligible for rehire. In addition, it is not unreasonable to think that T. Gatewood might revisit his acceptance of Howard's history of union affiliation when the Respondent became the subject of a union campaign. Although the question is not free from doubt, I find that the record provides sufficient evidence to satisfy the initial showing requirement under *Wright Line.*

Since the General Counsel has made the required initial *Wright Line* showing, the burden shifts to the Respondent to show that it would have terminated Howard even in the absence of his known protected activities. T. Gatewood's testimony was that Howard was terminated because his productivity, and to a lesser extent the quality of his work, were inadequate. The evidence shows that, even before the Respondent knew of the Union campaign, T. Gatewood expressed dissatisfaction with Howard's productivity. After Howard had been on the job for about 6 weeks—i.e., in May or June 2012—T. Gatewood criticized Howard's pace at the Tech High School project. Shortly thereafter, T. Gatewood told Howard that he was working too slowly on a different project and raised the possibility of discharge with Howard. The events that led immediately to Howard's discharge occurred in February 2013 when T. Gatewood documented the state of Howard's projects at Grissom and concluded that Howard was making insufficient progress. At that time T. Gatewood yelled at Howard, told him that he was not "getting anything done," and discharged him. Then, T. Gatewood agreed to give Howard another chance. However, Howard's pace during the ensuing days was less than half that of another employee doing the same work.

I find that the Respondent has met its burden of showing it would have terminated Howard for his work deficiencies even absent his protected activities. In reaching this conclusion, I considered some arguably countervailing evidence. Specifically, I considered that while T. Gatewood had criticized Howard's performance both before and after the start of the union campaign, he had also given Howard positive feedback in October and December 2012 and had rewarded him at those times by including him on a company-sponsored trip and awarding him a year-end bonus. If the timing had shown that the Respondent was giving Howard this positive feedback before it knew about the union campaign, but then dramatically changed its attitude towards Howard after finding out about the campaign, the evidence of the change in attitude would be compelling. However, the facts are that the Respondent had criticized Howard's productivity long *before* the start of the union campaign and gave Howard the year-end praise and bonus in December well *after* it became aware of the union effort. The record does not show any development regarding union activity between the end of 2012, and the time of Howard's termination on February 26, 2013, that would explain why the Respondent would suddenly become more hostile towards Howard's history of union affiliation or use of union work clothes. Indeed, Howard himself opined that during the latter part of his tenure he believed that "everybody was tense" because the Grissom job was not going well. The evidence does not show that T. Gatewood was holding Howard to higher standard in February 2012 than he had previously, but even if it did, Howard's own testimony suggests that this was the result of T. Gatewood's concern about the success of the job, as opposed to concern about a union campaign that was not shown to be particularly active at the time.

I also considered the fact that the paperwork that Young, the plumbing foreman, prepared regarding Howard's termination is somewhat inconsistent with T. Gatewood's testimony that Howard was terminated because of his low productivity. The Board has held that when an employer offers inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons being offered are pretexts designed to mask an unlawful motive. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 (2007); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), enfd. 160 F.3d 353 (7th Cir. 1998). In this

case, the termination paperwork, while listing problems with Howard's "work production" in April 2012 and his "work ethics and production" in 2013, states that the reason Howard was being terminated was a "[w]ork slow down/plumbing department labor reduction." Under all the circumstances present here I do not consider this termination paperwork so at odds with T. Gatewood's testimony as to give rise to an inference that T. Gatewood's explanation for Howard's termination was pretextual. While the paperwork is inconsistent with T. Gatewood's testimony in that it lists a labor reduction as the reason for Howard's termination, it is also consistent with T. Gatewood's testimony in that it states that Howard had problems with productivity in 2012 and 2013. In addition, the evidence does not show that Young was involved in the termination decision and also does not show what information he relied on when he listed the ongoing labor reduction as the reason for the termination. Rather the evidence showed that T. Gatewood made the decision to terminate Howard and communicated that decision to Price. Under these circumstances, I do not consider the discrepancy between the explanation testified to by T. Gatewood and the paperwork created by Young to be particularly telling.

For the reasons discussed above, I find that the General Counsel has failed to establish that the Respondent violated Section 8(a)(3) and (1) when it terminated Howard's employment on February 26, 2013. That allegation should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent discriminated against and discouraged employees from engaging in protected activities in violation of Section 8(a)(3) and (1), and Section 8(a)(4) and (1) of the Act on November 12, 2012, when it suspended Lehr and changed his working conditions.

4. The Respondent was not shown to have committed the other violations alleged in the Complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily suspended Lehr without pay and discriminatorily changed Lehr's work schedule, must make him whole for any loss of earnings and other benefits resulting from that discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[14]

ORDER

The Respondent, Commercial Air, Inc., Lebanon, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, changing the working conditions of, or otherwise discriminating against any employee for supporting the Indiana State Pipe Trades Association and U.A. Local 440, AFL–CIO (the Union) or any other union.

(b) Suspending, changing the working conditions of, or otherwise discriminating against any employee for participating in the Board's processes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Christopher Lehr whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension, and within 3 days thereafter notify the employee in writing that this has been done and that the suspension will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Lebanon, Indiana, facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 12, 2012.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 1, 2014

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend you, change your working conditions, or otherwise discriminate against any of you for supporting the Indiana State Pipe Trades Association and U.A. Local 440, AFL–CIO, or any other union.

WE WILL NOT suspend you, change your working conditions, or otherwise discriminate against any of you for participating in the processes of the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Christopher Lehr whole for any loss of earnings and other benefits resulting from his suspension and unlawfully imposed change in schedule, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension of Christopher Lehr, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

COMMERCIAL AIR INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-092821 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.